



Legal Requirements Summary Checklist

A Mandatory Reference for ADS Chapter 201

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USAID funds are subject to numerous legal requirements that must be met prior to the obligation and/or expenditure of funds. These requirements apply to both field Missions and Washington Operating Units (OUs). They also apply to situations where Missions buy into Washington-based awards.

USAID OUs may obligate and expend funds in varied ways. Many Missions initially obligate funding into bilateral agreements with host governments, generally termed as Development Objective Agreements (DOAGs). Obligations into DOAGs are sometimes referred to as “bilateral obligations.” Other OUs obligate funding directly into assistance and acquisition (A&A) awards with non-governmental entities as well as other legally binding instruments. Such obligations are sometimes referred to as “unilateral obligations.” As a legal matter, “bilateral” and “unilateral” obligations are both obligations of U.S. Government funds for which all pre-obligation requirements must be met.

Consideration of legal requirements and constraints should occur throughout strategy, project, and activity design. Consultation with your Resident Legal Officer (RLO) or General Counsel (GC) contact early in the design process is encouraged and facilitates resolution of any legal issues prior to the obligation stage. Some legal and policy requirements may be properly addressed at a sub-obligation stage if a Mission initially obligates funding into a DOAG. In cases of Mission buy-ins to Washington-based awards, Missions—in consultation with the Washington OU—should document that legal requirements for use of Mission funding have been addressed. Missions and Washington OUs should work with their respective RLO or GC contact on questions relating to legal requirements and at what stage in planning and implementing they should be addressed.

The following summary checklist is designed to assist USAID staff in ensuring that funds are obligated and expended in accordance with legal requirements. While the checklist identifies key legal requirements that should be addressed and documented prior to the obligation and/or sub-obligation stage, it does not identify all potentially applicable legal requirements, which will be context- and country-specific. Missions and Washington OUs should work with their RLO or GC contacts to assure compliance with all applicable requirements.

Following this summary checklist are Annex 1: Explanatory Note for Checklist Items, which provides additional detail on the legal requirements and Annex 2: Explanatory Note for DOAGs, which provides special considerations for obligation by DOAG.

SUMMARY CHECKLIST

Legal Requirement	Obligation (including DOAG)	Sub-Obligation
1. Fiscal Year Statutory Checklists (both)* <ul style="list-style-type: none"> Country Level Statutory Review Activity Level Statutory Review 	Required**	RLO/GC to determine if new activity checklist required
2. Illustrative budget providing reasonably firm estimate of the cost to the USG	Required	Required
3. Initial Environmental Examination (IEE)/Threshold Determination See ADS Chapter 204	Required, although OU, in consultation with the Bureau Environmental Officer (BEO) could defer	New activities must fall within scope of existing IEE or amendment is required
4. Congressional Notification (CN)	Required	New activities must fall within scope of CN
5. Funds Availability See ADS Chapter 601	Required	Required
6. Foreign Assistance Act (FAA) Section 611(a) adequate planning See ADS Chapter 201	Required	Statutory requirement met prior to obligation
7. Approval by an authorized official See ADS Chapter 103	Required	OUs may tailor approval procedures to needs
8. Gender Analysis See ADS Chapter 205	Required, although in case of a DOAG obligation, could be deferred	Required
9. Terrorism Financing Risk-based Assessment (RBA)*	Required, although in case of a DOAG	Required

Legal Requirement	Obligation (including DOAG)	Sub-Obligation
	obligation, could be deferred	
10. Climate Risk Screening Executive Order 13677 of 9/23/2014		Required as of October 1, 2016

* While the Statutory Checklists and RBA are not, strictly speaking, legal requirements, they are tools designed to ensure compliance with legal requirements and thus included here.

** Unless exception approved by RLO or GC contact.

ANNEX 1: Summary Checklist Requirements

The following provides additional detail for each legal or policy requirement on the checklist.

Statutory Checklists: The statutory checklists are designed to ensure compliance with country and activity prohibitions and restrictions. USAID, as an Agency, must manage its programs and operations in compliance with applicable legal restrictions (statutory and regulatory). Obligations and sub-obligations of funds must be for activities that are conducted consistent with applicable restrictions or where special authority, such as “notwithstanding” authority, allows an activity to be conducted even though applicable restrictions would otherwise prevent it.

Most legal prohibitions and restrictions on the use of funds apply based on the fiscal year for which the funds are appropriated and remain applicable to those funds until they are expended, sometimes years later. Additionally, funds which are obligated, de-obligated, and then are available for re-obligation retain their original fiscal year identification and must be used in accordance with the terms and conditions of the appropriations act that first appropriated them. Consequently, if funds originally appropriated in different fiscal years are to be used to fund an activity, checklists must be completed for each fiscal year of funding. Additionally, some legal restrictions may affect prior year funding once triggered. For example, an appropriations act may restrict an activity funded “by this Act or any other Act,” in which case funds still available from prior fiscal years would also be subject to the restriction.

Legal restrictions are expressed in a variety of ways, such as restricting assistance to a particular country or a category of countries (such as those that are in arrears in repayment of debt to the U.S. Government)—or more narrowly, to the government or central government of a country or countries—or in terms of a particular type of assistance (such as police assistance).

Missions and Washington OUs should use two types of checklists to assist in compliance with country restrictions: The Country-Level Statutory Review (Country Checklist) and the Activity Level Statutory Review (Activity Checklist). Each checklist summarizes various legal restrictions and provides a simple way to confirm and document that USAID-funded programs comply with restrictions applicable to funding appropriated for a particular fiscal year. Both checklist templates are updated annually by GC to reflect changes in legal restrictions, and are available from GC or RLOs (see [USAID Statutory Checklists](#)). Completed checklists should be retained in the official project and/or activity files of the responsible Mission or Washington OU.

- Country-Level Statutory Review (Country Checklist): A Country Checklist corresponding to the fiscal year (or years) in which the funds to be used for the countries for which the activity will provide assistance were originally appropriated must be completed prior to obligation of funds. This Country Checklist must be completed by the cognizant Bureau desk officer, with clearance by Department of State and GC, and must be reviewed and on file with

the responsible Mission or Washington OU at the time of approval of the activity, or, for a subsequent obligation of funds from an additional fiscal year, prior to approval of such obligation. Because restrictions on assistance to a country that affect prior year funds may be triggered in subsequent years, it is wise to also review the most current Country Checklist. Should answers to the current Country Checklist change during the fiscal year—for example, if a restriction is triggered after clearance of the checklist—the RLO or GC contact may request that the Mission or Washington OU add additional information about the changed answer to the cleared checklist.

- Activity-Level Statutory Review (Activity Checklist): An Activity Checklist corresponding to each fiscal year in which the funds that will be used for assistance activities were originally appropriated must be completed by the Mission or Washington OU and approved by the GC or the RLO prior to obligation of funds. It is crucial that USAID staff with close knowledge of the activity complete and review the checklist. In the case of activities funded incrementally in more than one fiscal year, the Activity Checklist should be reviewed before subsequent increments of funding in future fiscal years are provided to ensure compliance with any new or different requirements that may be applicable to those fiscal year funds.

These checklists do not contain the entire universe of legal restrictions that may be applicable in every instance. GC and RLOs advise as to whether particular countries or activities are affected by legal restrictions, and whether particular waiver authorities may be exercised, based on facts provided by Mission or Washington OUs.

It is also important to note that it is often advisable to review compliance with legal requirements at the appropriate stage of planning and authorizing document and at the subsequent stage of entering into implementing mechanisms. Missions or Washington OUs are encouraged to consider, in consultation with the RLO or GC point of contact, how to best ensure that legal review of proposed activities is completed at the appropriate time to be meaningful.

Illustrative Budget: A reasonably firm estimate of the cost of accomplishing the specified or illustrative activities. The requirement for an illustrative budget stems from the adequate planning requirement of [FAA Section 611\(a\)](#), which is further explained below.

Initial Environmental Examination (IEE): Before the obligation of funds for a Development Objective (DO), activity or substantive amendment, an IEE (hereafter called “environmental review”) under USAID Environmental Procedures (see [22 CFR 216](#)) must be completed by the action’s originator. The relevant BEO must either concur with or request revision of the result of the environmental review (see [ADS 204](#)).

If there is not sufficient information to conduct an environmental review of specific projects or activities at the time of obligating funds into a DOAG, a Mission or Washington OU—in consultation with the BEO or delegate—may defer conduct of the

environmental review as appropriate for those specific projects or activities. Any deferral should be documented as part of the approving documentation, and indicate when the environmental review will be completed. To prevent an expenditure of funds for activities for which an environmental review has not been completed, Missions or Washington OUs must consult with GC with respect to the use of incremental funding and covenants before the obligation of funds for a DOAG or activity.

Congressional Notification (CN): Congress generally must be notified 15 days in advance regarding the use of the relevant funds, and there must be no outstanding congressional objection to or hold on the CN that was submitted. See [FAA Section 634A](#), and [Foreign Operations Appropriations Act](#) provisions for the relevant fiscal year(s). See also annual guidance on CNs issued by LPA. In general, except in cases when a special CN is required, USAID notifies its programs through the Congressional Budget Justification (CBJ). The CBJ notification is sufficient if there are no subsequent, significant shifts in programming, and if there are no applicable special notification requirements. If there are any significant shifts or special notification requirements applicable to the proposed activity or country, then a CN must be completed prior to commencing the activity. CNs should also be completed prior to obligation of funds. In some situations, particularly in the case of obligation into a DOAG, post-obligation changes in program plans may result in a subsequent need for a special CN after obligation, which must be completed prior to sub-obligation. Note that certain appropriation accounts may have unique legal authorities or requirements on which the RLO or GC contact should advise.

Funds Availability: Funds must be available before actual obligation and their availability formally documented. See the Federal Anti-Deficiency Act – [31 USC Section 1341\(a\)\(1\)](#) and [FAA Section 634A](#), [Foreign Operations Appropriations Act](#) (see [ADS 634](#) for more information).

FAA Section 611(a), Pre-obligation Adequate Planning: FAA Section 611(a) requires adequate planning prior to obligating funds. It states, “No agreement or grant which constitutes an obligation of the [USG] [for assistance] in excess of \$500,000...shall be made if the agreement or grant... requires substantive technical or financial planning, until engineering, financial, and other plans necessary to carry out such assistance, and a reasonably firm estimate of the cost to the United States Government of providing such assistance, have been completed;...”

The amount and type of planning depends upon the type and purpose of the assistance—with capital activities generally requiring the most. However, some pre-obligation planning is required for even broad, non-capital activities. The requirement includes both technical and financial planning. When obligating directly into an implementing mechanism, adequate planning has generally been completed through the solicitation and procurement process. However, Missions and Washington OUs must understand that 611(a) applies to any obligations, including those into DOAGs, and must pay particular attention to ensuring that adequate planning is complete prior to obligating funding into a DOAG. Further discussion of adequate planning in the DOAG context is contained in Annex 2.

Approval by an Authorized Official: An authorized official must approve the project or activity. Such approval may be done via approval of a Project Appraisal Document (PAD) or other activity clearance documentation, where appropriate. The authority of the official to approve the project or activity should be documented in the approval package. An authorized official must also execute the obligation. For information as to which officials are authorized to approve projects or activities and any other applicable Mission or Bureau delegations of authority (see [ADS 103](#)).

Gender Analysis: USAID policy requires that Missions and Washington OUs include gender analysis as part of the strategy development and project and activity design processes. This satisfies Section 113 of the FAA, which requires that assistance under Part I of the FAA be “administered so as to give particular attention to those programs, projects, and activities which tend to integrate women into the national economies of developing countries, thus improving their status and assisting the total development effort.” Although Part I of the FAA is specifically related to Development Assistance (DA) and activities normally funded from the DA account, Agency policy requires gender analysis with respect to all USAID-funded activities, regardless of the funding source (see [ADS 205](#) for more information).

Terrorism Financing Risk-Based Assessments (RBAs): In 2008, the Department of State established a requirement that RBAs be prepared prior to spending foreign assistance funds on an activity. These RBAs are a means to minimize the risk that any foreign assistance funds finance terrorist activity and build on legal requirements and processes already in place. RBAs may be prepared for single activities or groups of activities, and their format may vary across Bureaus. For additional guidance and information, consult with your Bureau’s Program Office.

Climate Risk Screening: Executive Order 13677 on Climate-Resilient International Development requires the integration of climate-resilience considerations into all United States international development work to the extent permitted by law. Starting October 1, 2016 (FY 2017), USAID will begin applying climate risk management practices to all new projects and activities, with limited exceptions. Please see Agency guidance and separate mandatory reference for additional information.

ANNEX 2: Explanatory Note on Obligation by Development Objective Agreement (DOAG)

In many Missions, USAID funds are obligated through a DOAG—formerly called a Strategic Objective Assistance Agreement (SOAG) or Assistance Agreement. DOAGs are grant agreements with a recipient government, although in most cases, the parties to the DOAG agree that USAID may sub-obligate and disburse funds directly to third-party grantees and contractors. DOAGs incorporate key conditions and requirements for both parties and can serve as a way to obligate funds at the DO level, providing Missions with a degree of adaptability to respond to changing circumstances without necessarily having to de-obligate funds. All pre-obligation requirements must be met prior to the obligation of USAID funds in a DOAG, which occurs when the DOAG is signed. In particular, Missions must ensure that adequate planning is completed to satisfy [FAA Section 611\(a\)](#) and that the DOAG constitutes a valid and binding obligation.

It is recommended that DOAGs cover only one DO. Limiting a DOAG to a single DO will help ensure that funds are obligated and used for the DO purpose for which they are authorized and notified; facilitate proper accounting; help ensure valid, binding obligations of funds; and facilitate completion of statutory pre-obligation planning requirements prior to the obligation of funds.

There may, however, be valid reasons for entering into a DOAG that includes more than one DO. If considering a multi-DO DOAG, the RLO and Controller should be consulted prior to entering into negotiations with the partner country. Please be aware that if obligating funds to more than one DO in a DOAG, funds must be obligated and recorded for each individual DO. There must be no DOAG “purpose” higher than the purposes of the separate DOs nor funds that appear to be obligated above the level of the individual DOs. The Mission must clearly document how it will comply with all pre-obligation requirements prior to signing the multi-DO DOAG, including those discussed in [ADS 201](#) and [ADS 350, Grants to Foreign Governments](#), and specifically the following:

- That funds are obligated and used only for the purpose (DO) for which they are authorized and notified;
- Accounting and funds controls will be adequate (i.e., at the level of the individual DOs);
- The agreement will constitute a valid and binding obligation of funds; and
- All statutory pre-obligation planning requirements (as well as all other pre-obligation requirements) will be completed prior to the obligation of funds.

As noted above, pre-obligation requirements must be satisfied prior to obligation of funds by DOAG. The following section provides additional details as to best practices on

satisfying the requirements for a binding obligation and adequate planning in the context of obligation by DOAG.

1. **31 USC 1501, Binding Obligation:** To ensure that DOAGs create valid, legally binding obligations, the following requirements must be met:
 - **Specificity:** The DOAG must contain sufficient specificity of what it will fund. DOAGs that reflect FAA Section 611(a) adequate planning requirements (discussed below) would typically meet the specificity requirement.
 - **Concurrence with USAID Sub-obligations:** If, after granting funds to a partner government in a DOAG, USAID intends to then itself provide the funds to third parties (i.e., by sub-obligation) for certain uses (e.g., A&A awards), this must be concurred in by the partner government in some manner. This concurrence can be provided by whomever the partner government indicates for this purpose and in whatever form and level of generality/detail are satisfactory to the partner government. For instance, the partner government could communicate its concurrence by signing a DOAG that contains a program description and illustrative activities in an Annex, or by subsequent Implementation Letter approving a list of activities to be funded, or otherwise.
 - **Objective Conditions:** Conditions or reservations in the DOAG on USAID's obligation to disburse funds, whether as formal conditions precedent (CPs) or otherwise, must be objective and outside USAID's control and not pursuant to "agreement by the partner government and USAID" on what needs to be done." For instance, a CP to disbursement requiring the partner government's submission of an environmental remediation plan "in form and substance satisfactory to USAID," may be sufficiently objective, while a statement that "USAID and the partner government will agree on the activities to be implemented" may raise a question as to whether it constitutes an inappropriate "agreement to agree."
2. **FAA Section 611(a), Pre-obligation Adequate Planning:** In the context of a DOAG, Section 611(a) adequate planning requirements can be met in several different ways:
 - Specific activities for the overall DO may be fully planned before funds are obligated into a DOAG.
 - Obligation may be based on criteria and procedures for activity selection, together with illustrative activities and associated illustrative budgets.
 - For incrementally funded activities, full planning may occur for specific activities for which funds are currently being obligated, with adequate planning requirements met for each subsequent incremental obligation at the time additional funds are being obligated. For instance, an initial obligation for technical assistance to design a large-scale intervention may require less

planning and can be used to complete planning for subsequent incremental obligations.

Approaches for Meeting FAA 611(a) Requirements: Recognizing that the final judgment of what is needed to meet 611(a) requirements is case-specific, the following are the minimum requirements:

- An analysis of constraints and explanation of the development hypothesis required for Country Development Cooperation Strategies (CDCSs).
- Identification of specific activities or identification of criteria and procedures for activity selection, together with illustrative activities.
- Identification of binding (critical) constraints to achievement of the purpose of the obligation, together with an explanation of how it is reasonably expected that such constraints will be addressed. Review of Results Framework and Logic Model assumptions, proposed CPs and covenants, policy environment, and statutory checklists are particularly likely to identify these critical constraints, and thus it is recommended that they be reviewed pre-obligation. Where certain activities are the key to achievement of the purpose (DO) of the obligation, the binding constraints for those activities must be addressed. For other activities, it may be possible to substitute alternative activities if binding constraints emerge during the PAD process. It is recognized, of course, that not every one of the issues identified in these reviews reaches the critical level needing to be addressed pre-obligation; and
- A reasonably firm estimate of the cost of accomplishing the specified or illustrative activities based on actual cost analysis and not merely on the amount of available funds.

Documentation: While CDCSs contain a thorough analysis of constraints and opportunities and a robust development hypothesis, they often do not identify specific or illustrative activities or reasonably firm cost estimates for them, nor do they explain how binding constraints will be addressed. Thus, how the additional considerations are addressed should be documented in some place before obligation through such approaches as:

- Sufficient detail in the CDCS;
- Approval of a full PAD or key sections of the PAD before obligation into DOAG;
- Sufficient detail in the annual Operational Plan (OP) submitted to the Office of the Director of Foreign Assistance (or similar document, such as PEPFAR Country Operational Plan or PMI Malaria Operational Plan), together with underlying technical and cost analyses; or

- An action memo for the DOAG obligation addressing additional considerations.

Some DO Teams, particularly those with highly focused programs and minimal staff, may rely heavily on documents from their files—such as the joint country assistance strategy and OPs, Results Frameworks, detailed budget estimates, A&A requests, interagency agreements, and related documentation—to satisfy pre-obligation requirements. One difficulty with this approach is that all of the pre-obligation and project or activity planning requirements may not be adequately addressed on the record. To address this problem, this reference provides Missions with a concise checklist of pre-obligation legal and policy requirements to confirm to the obligating official that the required documentation has been prepared and to specify where it may be found.

Some Missions also use specific clearance requirements and clearance sheets to help ensure that all requirements are met before obligation and activity approval. Clearances by specified officers (such as the Program Officer, Controller, RLO, Contracting Officer, Mission Environmental Officer, and other DO Team members) are used to confirm to the obligating and approving officials (and for the record) that pre-obligation and project or activity planning requirements have been met and that obligating instruments contain all necessary clauses consistent with law, regulation, and policy, including counterpart funding requirements. Such clearances may accompany a bilateral DOAG or other project and activity approval.

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